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Alliant Techsystems v. Salt Lake County Board of Equalization, Utah State Tax Commission and Granite School District : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

ALLIANT TECHSYSTEMS, INC., Appellant, v. SALT LAKE COUNTY BOARD OF EQUALIZATION, UTAH STATE TAX COMMISSION, and GRANITE SCHOOL DISTRICT, Appellees.	)	Case No. 20100029

REPLY BRIEF OF APPELLANT IN RESPONSE TO THE BRIEFS OF SALT LAKE COUNTY AND GRANITE SCHOOL DISTRICT

APPEAL FROM THE FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH THE HONORABLE JON M. MEMMOTT, TAX COURT JUDGE

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I. THIS COURT'S RECENT RULING THAT A PROPERTY OWNER WHO RETAINS THE RIGHT TO POSSESS HIS PROPERTY CANNOT CONVEY "EXCLUSIVE POSSESSION" OF THAT PROPERTY FULLY RESOLVES THIS APPEAL.

Privilege tax is not imposed on "the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to ***exclusive possession*** of the premises to which the lease, permit, or easement relates." *Id.*, § 59-4-101(3)(e) (emphasis added). The issue before this Court is whether a property owner can retain possession of exempt property and simultaneously convey ***exclusive*** possession of that property to a beneficial user of the exempt property.

The district court, on the basis of undisputed facts, held that the Navy maintained a constant presence on the NIROP property, R. 750-751, 1084, and employed on-site personnel whose specific duties were to manage the NIROP facilities and FBM program. R. 750. It also recognized that ATK had no right to exclude the Navy or anyone authorized by the Navy from entering NIROP or using NIROP facilities. R. 751 ¶ 17. The district court concluded that ATK held exclusive possession because "[n]o one else ***other than the land owner (i.e. the Navy)***, had any possession, use management, or control of the NIROP Property during 2000." R. 1090 (emphasis added).

Appellees have not disputed the district court's finding that the Navy retained possession of NIROP, but have continued to claim that ATK has "exclusive possession" of NIROP because no one other than ATK and the Navy had possession of NIROP during 2000. Inasmuch as the possession by the Navy is uncontested, the specific issue before

this Court is whether the Navy could convey "exclusive possession" of NIROP to ATK while retaining its own right to possess NIROP. The answer is a resounding **no**.

In a unanimous decision issued less than two weeks after ATK filed its Opening Brief in this appeal, this Court addressed that very issue and held that a property owner who retains possession of his property "could not have granted ***exclusive*** possession" to another party. *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, 232 P.3d 999 (emphasis added). Osguthorpes were the owners of property leased to Wolf Mountain for use as a commercial recreational area. The lease agreement did not allow Wolf Mountain to exclude others from the property and retained Osguthorpes' right to use or possess the property. It also specified that Wolf Mountain could only erect structures required for a ski area on that property. This Court held that "the Osguthorpes retained the specific right to possess the Property," and that "[s]uch an arrangement is not consistent with conveyance of a possessory interest to Wolf Mountain." *Id.* at ¶ 28. This Court also held that the Osguthorpes' specifications regarding the way in which Wolf Mountain was permitted to use the property "limited Wolf Mountain in its use of the land, which is characteristic of a nonpossessory interest." *Id.* at ¶ 27.

Like the Osguthorpes, the Navy has also imposed limitations on ATK's use of NIROP which limit ATK's use of the land, rendering it nonpossessory. For example, "ATK is granted access to, and use of, NIROP to fulfill contracts and subcontracts that ATK has with the Navy." County's Brief, p. 11 ¶ 17. By those contracts and

subcontracts, ATK is required to use NIROP in the manufacture of rocket motors for the Navy's Fleet Ballistic Missile (FBM) programs and other Navy programs. *Id.*, p. 8 ¶ 9. The Navy, through the SSP, has direct management responsibility for NIROP and tells ATK what it can and cannot do with NIROP. R. 83, 625(p. 95:25-956:4), 750 ¶ 10, 1084, 1090. ATK cannot use NIROP property other than as directed by the Facilities Use Contract unless it has written permission from the Navy. R. 750 ¶ 9. ATK has no authority to exclude the government or anyone authorized by the government from entering NIROP or using NIROP facilities. R. 751 ¶ 17.[1] Any "unauthorized use of [NIROP] can subject a person to fine, imprisonment, or both, under 18 U.S.C. 641." County's Brief, p. 12 ¶ 23, R. 725, 250 ¶ 11, 840. As the *Osguthorpe* Court observed, specifications such as these, "limited [ATK] in its use of the land, which is characteristic of a nonpossessory interest." 2010 UT 29 ¶ 27.

Significantly, the mere retention by the owner of the right to possess the property was, in this Court's view, sufficient to defeat a finding of "exclusive possession":

> In granting rights to American Skiing to operate the ski area, the Osguthorpes specifically retained their rights to continue to use and possess the Property. Because the Osguthorpes retained possession, they could not have granted exclusive possession to American Skiing. In short, neither Wolf Mountain nor American Skiing has ever been in exclusive possession of the Property.

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[1] The County claims that "there would be no reason for the Navy to block access to ATK personnel to NIROP." County's Brief, p. 10 ¶ 15. This is unsupported conjecture and the allegation that "there would be no reason" to block ATK's access to NIROP, does not refute the established fact that "[t]he government can refuse to give permission to ATK to use NIROP property." R. 751 ¶ 16.

2010 UT 29 ¶ 29. This case directly refutes the district court's decision to disregard the retained interest of the property owner and the County's claim that the only possible interpretation of "exclusive possession" is "*third* party exclusivity or exclusive possession as to *third parties* and not as to the exempt property owner." County's Brief, p. 30.

Just as the County has tried to distinguish *Keller v. Southwood N. Med. Pavilion*, 959 P.2d 102, 107 (Utah 1998) on the grounds that it was a forcible entry action, ATK anticipates that the County would likewise urge this Court to disregard *Osguthorpe* because it is an unlawful detainer action. In its Opening Brief, ATK explained that the evaluation of the nature of the interest conveyed to Keller was an essential preliminary determination which the Court had to make before it could address the forcible entry claim. The County responded by characterizing "the forcible retainer statute and Utah's Privilege Tax Act [as] contrasting statutes with absolutely no comparable analysis in creation, interpretation or application." County's Brief, p. 29. While there are differences between the statutes, those differences provide no legal basis for taking disparate approaches to determining the nature of the interest conveyed by a property owner.

Although *Osguthorpe* was an unlawful detainer action, this Court held that the statute could only be applied once the Court determined whether the lease "transferred a possessory interest in the Property from the Osguthorpes to either Wolf Mountain or American Skiing." 2010 UT 29 ¶ 24. In determining whether the lease transferred

possession of the property, this Court did not rely on law which was unique to unlawful detainer actions. Instead, it examined general law regarding the conveyance of property rights such as that found in 49 Am. Jur. 2d *Landlord and Tenant* § 21 (1995) (cited in *Keller*, 959 P.2d at 107) and *Restatement (First) of Property* § 7 (1936). *Osguthorpe*, 2010 UT 29 ¶ 25, 27. The same type of analysis is required in this case. Before the Court can determine whether ATK is exempt from privilege tax, it must examine the nature of the interest conveyed by the Navy. This Court has made it very clear that when a property owner "retained possession, they could not have granted exclusive possession." *Osguthorpe*, 2010 UT 29 ¶ 29. The district court's disregard of the Navy's continued, uncontroverted possession of NIROP is reversible error.

Even though ATK believes that *Osguthorpe* fully resolves this appeal, the arguments raised by the County in its brief are addressed in the remainder of this Reply Brief.

II. THE COUNTY'S INTERPRETATION OF THE STATUTE HAS NO BASIS IN LAW.

The County's brief begins with several arguments which are not material to the issue before this Court. First, the County discusses the legislative purpose underlying the privilege tax statutes--a purpose which is both undisputed and immaterial.[2] Second, the

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[2] That legislative purpose is neither disputed nor challenged by ATK. However, it is critical to point out that this Court has held that the "'gap-closing' purpose of the privilege tax statute" does not justify ignoring plain statutory language. *County Bd. of Equalization v. Utah State Tax Comm'n*, 927 P.2d 176, 184 (Utah 1996).

County discusses the fact that ATK meets the threshold requirements for privilege tax assessment because it uses exempt property for profitable means--an issue which has never been in dispute.[3] County's Brief, p. 19. The County then devotes a significant portion of its response to a discussion of *Thiokol Chemical Corp. v. Peterson*, 393 P.2d 391 (Utah 1964), a case which is wholly inapplicable.[4] The County's discussion of the interpretive issue before this Court is limited to pages 24 to 33 of its Brief wherein it relies on the erroneous district court decision, two cases, and additional language in the

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[3] There is no dispute regarding the first two criteria for applying the privilege tax. The property in question is "exempt" and "is used in connection with a business conducted for profit." Utah Code Ann. § 59-4-101 (2000). The third criteria identified by the County is "whether an exemption applies." That is precisely the issue before this Court.

[4] The County accuses ATK of "misstat[ing] its relationship with the Government in its use of NIROP." County's Brief, p. 21. In support of that accusation, the County relies on *Thiokol* to assert that "ATK is an independent contractor and not an agent of the government." County's Brief, p. 22. The County also claims, in a latter section of its brief, that *Thiokol* is determinative of the issue in this case. County's Brief, pp. 34-35. As ATK explained in its Opening Brief, *Thiokol* is distinguishable because Thiokol claimed it was acting as an ***agent*** for the government and was thus entitled to governmental immunity from taxation. ATK makes no such claim and has consistently distinguished this case from *Thiokol* on those grounds. ATK's Opening Brief, p. 34, n. 11. The County has not challenged those distinctions, but entirely ignores them in its continued reliance on *Thiokol.* Another critical distinction is that ATK's challenge to the privilege tax is based on an exemption which was enacted more than twenty years after the *Thiokol* decision was issued. This Court has explained that the legislature's enactment of this exemption reflects its intention to "broaden" the available exemptions from privilege tax assessments. *County Bd. of Equal.*, 927 P.2d at 180 (emphasis added) ("We note that the Utah legislature apparently intended to also broaden the types of property exempt from Utah's privilege tax, by exempting . . . any property used pursuant to a federal grazing lease or permit ***and for certain nonexclusive leases, permits, and easements***."). In light of the significant difference in the legal landscape, the *Thiokol* decision does not dictate the conclusion in this case.

exemption to suggest that "'exclusive possession' under section 59-4-101(3)(e) refers to *third party* exclusivity or exclusive possession as to *third parties* and not as to the exempt property owner." County's Brief, p. 30 (emphasis by County). Not only does this interpretation conflict with *Osguthorpe*, but the County's interpretation of the exemption violates a cardinal rule of statutory construction which prohibits courts from "infer[ring] substantive terms into the text that are not already there." *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994).

First, the County relies on this Court's decision in *ABCO Enterprises v. Utah State Tax Comm'n*, 2009 UT 36, 211 P.3d 382, to suggest that, because an exempt property owner who grants a lease, permit, or easement to that property retains a certain bundle of rights, the owner's possession must be disregarded in the determination of whether a third party has "exclusive" possession. In *ABCO*, the taxpayer was a lessee who fully possessed the property and did not claim to be exempt under the provision before this Court. In *Osguthorpe* this Court recognized that a property owner can fully "transfer[] possession," of his property, 2010 UT 29 ¶ 25, but when that property owner "specifically retained their rights to continue to use and possess the Property . . . [he] could not have granted exclusive possession." *Id.* at ¶ 29. Because *ABCO* was a case in which possession had been fully transferred, that case does not support the County's interpretation of the privilege tax exemption.

The County also relies on a provision within the exemption, which is only applicable to lessees or permittees of mineral rights, to suggest that "exclusive possession" requires the Court to disregard possession by the property owner. That provision states that "[e]very lessee, permittee, or other holder of a right to remove or extract the mineral covered by the holder's lease, right, permit, or easement except from brines of the Great Salt Lake, is considered to be in possession of the premises, notwithstanding the fact that other parties may have a similar right to remove or extract another mineral from the same lands or estates." Utah Code Ann. § 59-4-101(3)(e). According to the County, the "reference to 'other parties' clarifies that 'exclusive possession' applies to *third parties* and not to the exempt property owner." County's Brief, p. 32.

This provision is neither "plain" nor "clarifying." While it does provide that all lessees, permittees, and easement holders of mining rights have "possession" of the premises, the language does not define ***"exclusive"*** possession. In fact, the word "exclusive" is not even used in the provision on which the County relies. Furthermore, because a property owner which leases mineral rights can also retain mining rights for itself, under the plain language of the provision relied on by the County, such an owner would "be in possession of the premises" with all other mineral rights holders.[5] Thus, the

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[5] If the County is suggesting that multiple permit holders have "exclusive possession" then this interpretation is problematic inasmuch as each permittee would then be assessed a privilege tax on the full value of the exempt property.

"other parties" referred to in the language cited by the County can conceivably include the property owner. That sentence simply does not provide the "clarification" suggested by the County. Finally, even if this provision narrowed the scope of the exemption, ATK would not be effected because ATK is not a "lessee, permittee, or other holder of a right to remove or extract [minerals]."[6]

The third basis on which the County relies for its statutory inference is a sheep grazing case from 1920 in which the issue before the Court was whether the plaintiff's grazing permit was exclusive. *Boley et al v. Butterfield*, 194 P. 128 (Utah 1920). In that case, the property owner had issued a grazing permit to Boley and to another party. Boley believed he had exclusive grazing rights and sued to enforce those rights. The fact that the grazing rights had been conferred to a "third party" does not support the inference of "third party exclusivity" asserted by the County. Such an inference could only be made if the property owner had attempted to exercise grazing rights and the Court had concluded that the owner's possession did not render the grazing permit non-exclusive. The fact that the Court held that Boley's right was non-exclusive vis-a-vis a third party does not mean that a property owner's retained interest is irrelevant to a determination of whether a

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[6] The County claims that, in 1975, the legislature "narrowed the *exclusive possession* exemption by adding this second sentence." County's Brief, p. 31 n. 58. When that alleged "narrowing" occurred, the exemption only applied to mineral and grazing leases. In 1987 the exemption was expanded to include all leases, permits, and easements and this Court has recognized that those 1987 amendments reflect the Legislature's intent to "***broaden*** the types of property exempt from Utah's privilege tax." *County Bd. of Equal.*, 927 P.2d at 180 (emphasis added).

permit conveys "exclusive" possession. This case provides no clarification whatsoever regarding whether "exclusive" requires a permittee to be able to exclude the property owner as well as other third parties.

III. THE DISTRICT COURT ERRED WHEN IT HELD THAT ATK'S INTERPRETATION OF THE PRIVILEGE TAX EXEMPTION WAS UNWORKABLE.

The district court held that "the language of the statute contemplates that a person may have exclusive possession under a lease, a permit, or an easement." R. 1083. The County claims that if a lease is the only conveyance by which a user can have "exclusive possession," then ATK's interpretation violates "principles of statutory construction that each word is used advisedly and effect should be given to each term according to its ordinary meaning." County's Brief, p. 29. It also states that "if one could never obtain 'exclusive possession' of real property by *permit*, then reference by section 59-4-101(3)(e) to permits is meaningless and inoperable . . . ." *Id.* (emphasis in original). This argument fails for two reasons. First, it ignores the fact that the reference to "lease, permit, or easement" is contained in the exemption, not the tax imposition statute. Second, the statutory reference to these different types of conveyances, does not imbue the written instruments with the legal characteristics they purport to possess. *Osguthorpe*, 2010 UT 29 ¶ 26.

The statute which imposes the privilege tax does not provide any characterization of the type of conveyance which will result in a privilege tax assessment. It simply states:

> Except as provided in Subsections (1)(b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit.

Utah Code Ann. § 59-4-101(1). Thus, there is no suggestion that permits and licenses are inherently subject to privilege tax. In contrast, the exemption at issue contains the only specific reference to leases, permits, and easements and provides that these conveyances are exempt "***unless*** the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates." Utah Code Ann. § 59-4-101(3)(e) (emphasis added).

The County claims that the reference to permits and easements in the foregoing exemption means that such conveyances can transfer "exclusive possession" or they would not be referenced in the exemption. That is neither an inevitable nor accurate conclusion. The exemption states that a permit is exempt "unless" the permit conveys exclusive possession to the permittee. This exemption implicitly recognizes that the mere characterization of a conveyance as a lease, permit, or easement does not imbue the conveyance with the legal characteristics inherent in such a conveyance, nor does it necessarily transfer "exclusive possession." Thus this Court has held that it "is not bound by the parties' characterization of their transaction or by any title they may have given a writing." *Osguthorpe*, 2010 UT 29 ¶ 26, *citing Keller*, 959 P.2d at 107. If a permit or easement conveys exclusive possession, it may, in fact, be a lease, and, regardless of how the document is characterized, it will be subject to privilege tax. On the other hand, a

lease which does not vest the beneficial user with exclusive possession against the owner of the fee may be more properly characterized as a license and is exempt under the provision before this Court. *Id.*[7]

ATK's interpretation of the statute is the only interpretation which gives effect to the "usual and accepted meaning" of "exclusive possession" as required by law. *Gull Labs, Inc. v. Utah State Tax Comm'n*, 936 P.2d 1082, 1084 (Utah Ct. App. 1997). Under the district court and the County's interpretation, a beneficial user will ***always*** have "exclusive possession" despite the degree of control and possession enjoyed by the property owner. For example, if a permit only entitles a permittee to "possess" the property three days per week and the owner "possesses" the property the remaining four days, the district court and the County believe that the beneficial user is subject to a privilege tax on the full value of the exempt property. The County has not denied that this is the result of the district court's interpretation.

At the hearing, the Commission conceded the fact that the beneficial user will be subject to a tax on the full value of the exempt property regardless of the limitations the owner imposes on the possession of the property:

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[7] In *Osguthorpe*, the parties referred to the written instruments as lease agreements, but the Court found that the agreements did not confer possessory interests. Even though a lease typically conveys possessory interests, the Court evidently did not consider it necessary to make any findings regarding the correct legal characterization of those documents--except to say that it was "not bound by the parties' characterization of their transaction." 2010 UT 29 ¶ 26.

> Q (The Court): The statement was made that it's either all or nothing, but if under the statute we don't do it all or nothing in all the parts that are there, is all or nothing the only interpretation as far as the tax commission? I mean do you believe -- I mean you said you wanted me to follow the one case, but is in fact are they doing all or nothing with all -- I mean are they treating leases, permits and easements all -- as all or nothing?
>
> A (Mr. McCarrey): Our position would be that it really does end up being an all or nothing your Honor.

Transcript of Hearing, p. 38:11-20 (Addendum D to County's Brief).

Thus, if the Navy were to issue a permit to a third party to use NIROP for the third Thursday of every January, under the district court's interpretation, ATK would not have exclusive possession and would be exempt from privilege tax. The fact that the Navy's undisputed possession of NIROP does not defeat a finding of "exclusive possession," but a more limited possession by a third party would render ATK's possession non-exclusive, illustrates the problem inherent in the district court's interpretation of the exemption.

There is no dispute that the Navy maintained a constant presence on the NIROP property, R. 750-751, 1084; it employed on-site personnel whose specific duties were to manage the NIROP facilities and FBM program, R. 750; ATK had no right to exclude the Navy or anyone authorized by the Navy from entering NIROP or using NIROP facilities, R. 751 ¶ 17; and "[n]o one else other than the land owner (*i.e.* the Navy), had any ***possession***, use management, or control of the NIROP Property during 2000," County's Brief, p. 16 (emphasis added). Inasmuch as the Navy "retained possession, [it]

could not have granted exclusive possession" of NIROP to ATK. *Osguthorpe*, 2010 UT 29 ¶ 29.

IV. THE DISTRICT COURT ERRED WHEN IT HELD THAT ATK DID NOT HAVE STANDING TO ASSERT A SUPREMACY CLAUSE VIOLATION.

The district court held that ATK did not have standing because it did not satisfy the requirements for third-party standing under *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992). In its brief, ATK has explained that *Shelledy* does not apply because ATK is asserting standing in its own right. The County seems to miss the point that *Shelledy* is inapplicable inasmuch as it appears to attach some significance to the fact that "ATK doesn't challenge the underlying correctness of *Shelledy*." County's Brief, p. 35.

Although the County claims that the district court's reliance on *Shelledy* was correct, *id.*, it does not respond to ATK's distinction between third party standing and traditional standing. Instead the County argues that ATK does not have standing because (a) it allegedly failed to claim economic impact prior to this appeal; and (b) it allegedly waived the supremacy clause issue after raising it below. The County's response to ATK's claim that it has standing in its own right under the traditional test for standing is based on misinterpretations of established Utah Supreme Court precedent and immaterial factual distinctions.

A. ATK Satisfied the Traditional Standing Criteria.

Because ATK asserts standing in its own right, the traditional test for standing applies and ATK need establish ***only one*** of the following:

> (1) the interests of the parties are adverse, and the party seeking relief has a legally protectible interest in the controversy; (2) no one has a greater interest than that party and the issue is unlikely to be raised at all if standing is denied; or (3) the issues raised by the party are of great public importance and ought to be judicially resolved.

State ex rel. M.W., 2000 UT 79, 12 P.3d 80, 83, *citing Kennecott Corp. v. Salt Lake County,* 702 P.2d 451, 454 (Utah 1985) (citing *Jenkins v. Swan,* 675 P.2d 1145, 1150-51 (Utah 1983)); *see also V-1 Oil Co. v. Utah State Tax Comm'n,* 942 P.2d 906, 910-11 (Utah 1996) (stating that "a party seeking standing must demonstrate only one of the [*Swan* requirements]"). Furthermore, this Court has explained that it is liberal in its recognition of taxpayer standing. *V-1 Oil Co.*, 942 P.2d at 910-11 ("We have liberally allowed taxpayers to challenge allegedly illegal or unconstitutional expenditures.").

ATK has standing under the traditional standing test. This Court has held that a party which alleges economic impact as a result of unconstitutional taxation "satisfies the first step of the standing test." *Kennecott*, 702 P.2d at 454. It has also recognized that an underassessment causes the taxing entity to "'suffer some distinct and palpable injury that gives [it] a personal stake' in the assessed value of state-assessed properties." *Id.* Conversely, an overassessment causes direct financial injury to the taxpayer.

The County tries to distinguish *County Board of Equalization* and *Kennecott* by suggesting that this Court's recognition of the County's standing was based on the County's "constitutional duty to assure that properties are taxed uniformly and equally." This was not the Court's holding. In *County Board of Equalization* (the "Evans and

Sutherland" case),[8] the County claimed that a particular privilege tax exemption unconstitutionally discriminated against the federal government and against nonprofit, private educational organizations. The Court held that the County had standing to assert constitutional violations because its "'budgeting and taxing functions'" were directly affected. 927 P.2d 176, 181, *citing Kennecott Corp. v. Salt Lake County*, 702 P.2d 451, 454-455 (Utah 1985).

In *Kennecott*, the Court observed that underassessment "could well prevent the County from ***raising adequate revenues*** to perform its statutorily established responsibilities." 702 P.2d 451, 454 (emphasis added). In *County Board of Equalization*, this Court cited *Kennecott* as support for its standing determination specifically because it recognized the direct financial impact taxing decisions have on "the counties' budgeting and taxing functions." 927 P.2d at 181.[9]

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[8] The County suggests that the issue of economic impact was not properly raised because ATK's reference to "*Evans & Sutherland*" at the hearing misled the Court. County's Brief, p. 36 n. 73. Contrary to the County's representation, counsel for ATK correctly identified the case as "*County Board of Equalization*, the Evans Sutherland case that's cited to you." Transcript of Hearing, p. 19:14-15. Because there were two *County Board of Equalization* cases, ATK attempted to provide clarification by referring to the case as "the Evans & Sutherland case." However, because there was another *Evans & Sutherland* case which had been identified in the briefing to the district court, the court did not review the *County Board of Equalization* case when it issued its decision on standing. There is no question that the district court was confused by counsel's reference to that case as "*Evans & Sutherland*," but that confusion is no justification for ignoring the precedent established by that case.

[9] In *Kennecott*, this Court recognized that the second step of the standing test was also satisfied because, "[i]f counties do not have standing to challenge underassessments of state-assessed properties, then underassessments could be effectively insulated from

The County also tries to distinguish *California Pharmacists Ass'n v. Maxwell-Jolley*, 563 F.3d 847 (9th Cir. 2009), but does not rebut the principle for which that case has been cited. In that case, the court recognized that the plaintiffs had standing to assert a violation of the Supremacy Clause because the allegedly unconstitutional statute would economically impact the plaintiffs. It held that "[a] cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights-based." *Id.* at 851. The County claims this case is inapplicable because the issue in that case was not one of taxation and because the parties sought declarative and injunctive relief. These are immaterial distinctions.[10] ATK cited this case to establish that third-party rights were not implicated by its challenge to the constitutionality of the district court's interpretation of the privilege tax statute. The case stands for the principle that "everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her." "*As Applied and Facial Challenges and Third-Party*

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challenges." *Id.* at 455. This test is also met in this appeal. If this Court held that ATK does not have standing to challenge the privilege tax assessment, then the overassessment would be "insulated from challenges" because the federal government is not required to pay the privilege tax and has no incentive to challenge the assessment.

[10] The County characterizes this appeal as "involv[ing] the doctrine of intergovernmental immunity" and attempts to distinguish *California Pharmacists Ass'n* on that basis. However, ATK has never based its Supremacy Clause argument on a claim of intergovernmental immunity. ATK is not a government agency, nor does it claim to be an agent of the federal government. *See* ATK's Opening Brief, p. 34 n. 11.

Standing," 113 Harv. L. Rev. 1321, 1327 (2000). The County's identification of immaterial factual distinctions does not effectively rebut the principle for which this case stands. Under traditional standing criteria, ATK has the right to assert a Supremacy Clause violation.

B. The Economic Impact of Allegedly Unconstitutional Taxation Is Not a New Issue in this Case.

According to the County, ATK did not allege "economic impact" until this appeal and "[f]ailure to raise [economic impact] precludes their consideration by the Court." *Id.* The County's claim that ATK did not allege "economic impact" until this appeal defies logic. An allegation of "economic impact" is implicit in any claim of unconstitutional taxation. Throughout these proceedings, ATK has continually asserted ***its own right*** to be free from unconstitutional taxation which, by its very nature, has an economic impact on ATK.[11]

In this case, ATK has challenged the district court's legal conclusion that it does not have standing under third-party standing rules. The fact that the district court

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[11] The issue of whether ATK had standing to challenge the constitutionality of the privilege tax assessment was raised by the County in its response to ATK's motion for summary judgment. The County relied on *Shelledy*, a third party standing case, to assert that ATK did not have standing to raise a constitutional challenge. In response, ATK stated that "[t]he County's assertion that 'ATK asserts a third party claim on behalf of the United States,' is patently false." R. 1074, n. 3. ATK explained that it was not "assert[ing] a claim on behalf of the Navy," but was asserting ***its own right*** to be free from unconstitutional taxation. R. 1074 (emphasis added). Even if ATK did not use the specific phrase "economic impact," such an impact is implicit in any taxpayer's claim of unconstitutional taxation.

addressed and decided this issue conclusively demonstrates the issue of standing was not raised "for the first time on appeal." County's Brief, p. 36. Moreover, inasmuch as this Court has recognized a defendant's right to raise standing for the first time on appeal, *Hogs R Us v. Town of Fairfield*, 2009 UT 21, 207 P.3d 1221, 1223-24, it follows that a party claiming standing should not be barred from challenging a court's legal decision on standing on all available bases. The County's effort to foreclose ATK's ability to challenge the district court's decision by suggesting it is precluded from asserting economic impact should not be seriously entertained. The law does not require parties to anticipate and respond to arguments made by an opposing party or decisions by a judicial body before those arguments are made or decisions are issued.[12]

By virtue of the fact that ATK is a taxpayer and was appealing an alleged overassessment, there is no question that ATK was asserting economic impact. Under this Court's ruling in *Kennecott*, such an impact satisfied traditional standing criteria.

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[12] The County cites *Ong International (USA), Inc. v. 11th Avenue Corp.*, 850 P.2d 447 (Utah 1993), as support for its claim that "[t]he issue of economic impact and argument under the Doctrine of Pre-emption cannot be raised for the first time on appeal." County's Brief, p. 36. This is a mischaracterization of that case. The issues before the *Ong* Court included whether the defendants could appeal the trial court's jury instruction which had not been challenged on the trial court level, and whether they could withdraw their own concession that the plaintiff's claims arose before a statute allowing treble damages went into effect. The Court refused to allow the defendants to raise these new arguments on appeal.

C. ATK Has Not Waived Standing or its Supremacy Clause Argument.

The County also defends the district court's standing decision on the grounds that ATK has allegedly waived its Supremacy Clause argument. The County improperly raises this argument as support for the district court's decision even though the district court did not conclude that waiver had occurred. Indeed, the discussion which the County has characterized as the waiver, was nothing of the sort. During the hearing, counsel for ATK acknowledged that the Supremacy Clause is designed to protect the federal government. This acknowledgment was not a waiver of ATK's right to challenge the unconstitutionality of the privilege tax assessment. ATK has continued to assert its own right to be free from unconstitutional taxation and bases the claim of unconstitutionality on the fact that the assessment on the full value of NIROP includes the value of the Navy's retained interest in NIROP in violation of the Supremacy Clause. If ATK had truly waived the Supremacy Clause argument, then the issue of standing would be moot.

ATK's right to be free from an unconstitutional overassessment is in no way inferior to the County's right to challenge allegedly unconstitutional underassessments. Economic consequences flow from either type of assessment and, under this Court's decisions in *County Bd. of Equalization* and *Kennecott*, such consequences are an adequate basis for standing. *See also V-1 Oil Co.*, 942 P.2d at 910-1.

V. THE DISTRICT COURT'S INTERPRETATION OF THE PRIVILEGE TAX EXEMPTION VIOLATES THE SUPREMACY CLAUSE.

ATK has argued that the privilege tax assessment violates the Supremacy Clause because it taxes the full value of NIROP even though ATK does not have exclusive possession of that property. Consequently some portion of the privilege tax is attributable to the federal government's retained interest in NIROP, which interest is not subject to tax under the Supremacy Clause. Inasmuch as "everyone has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her," 113 Harv. L. Rev. at 1327, ATK has challenged the enforcement of the privilege tax assessment as violative of the Supremacy Clause.

The County defends the constitutionality of the assessment on the basis that "[t]he Government's 'immunity does not shield private parties with whom it does business from state taxes.'" County's Brief, p. 39, *quoting United States v. New Mexico*, 455 U.S. 720, 733 (1982). However, ATK does not claim to be immune from privilege tax. This fact should have been clear from ATK's discussion of *Thiokol* wherein it explained that ATK "does not claim to be an agent of the United States." ATK's Opening Brief, p. 34 n. 11. Notwithstanding that fact, the County claims "that ATK is arguing for immunity." *Id.* at 40 n. 84. ATK has never suggested that Utah or any other state does not have a right to assess a privilege tax for the beneficial use of exempt property. Accordingly, there is no disagreement between the parties with the Supreme Court's declaration that governmental immunity "does not shield private parties with whom [the government] does business."

U.S. v. City of Detroit, 355 U.S. 489 (1958). However, a tax on the use of property is "valid only to the extent that it reaches the contractor's interest in Government-owned property." *New Mexico*, 455 U.S. at 741 n. 14. Utah's privilege tax statute comports with constitutional requirements if the privilege tax exemption at issue in this appeal is interpreted to prohibit a privilege tax assessment when the permittee does not have "exclusive possession" of the property vis a vis the property owner or any other party. However, if the exemption is interpreted to require an assessment on the full value of NIROP, even though the federal government retains some possession of that property, then the assessment violates the Supremacy Clause by taxing the federal government's retained interest in that property--even though the tax is assessed to the user of that property and not the federal government.

In support of its claim that the district court's interpretation of the privilege tax exemption violated the Supremacy Clause, ATK relied on several cases, including *United States v. Nye County*, 178 F.2d 1040 (9th Cir. 1991), *cert. denied*, 503 U.S. 919.[13] The County attempts to distinguish *Nye County*, 178 F.2d 1040, by characterizing the privilege tax as "a tax measure levied on the property itself." County's Brief, p. 41. This characterization of the offending tax in *Nye County* ignores the fact that the court characterized the tax assessed by Nye County as "an ad valorem tax on property of the United States" because:

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[13] *See* discussion and cases cited in ATK's Opening Brief, pp. 34-40.

> Arcata has no leasehold interest in [the property], but merely has the privilege terminable at the will of the government, to use the property at the time and place and in the manner directed by the United States. Nye County makes no attempt to segregate and tax any possessory interest Arcata may have in the property, or Arcata's beneficial use of the property.

Id. at 1043. The County's attempt to distinguish *Nye County* on the basis of the court's characterization of the tax as "an ad valorem tax on property of the United States," ignores the fact that the court made this comparison precisely because the tax was not limited to the value of "a lessee's possessory interest in, or a user's beneficial use of, property owned by the United States." *Id.* The tax assessed by Nye County was substantively identical to the tax assessed against ATK inasmuch as both taxes are assessed against the beneficial user of the property "'in the same amount and to the same extent as though the lessee or user were the owner of the property.'" 938 F.2d at 1043, quoting Nev. Rev. Stat. § 361.159.

The County then erroneously asserts that the Ninth Circuit approved a tax similar to Utah's privilege tax in *United States v. County of San Diego*, 965 F.2d 691 (9th Cir. 1992), when, in fact, the Ninth Circuit decision actually supports the position taken by ATK. County's Brief, p. 42. In *San Diego*, the contractor was assessed a tax based on the value of its possessory interest in federally owned property. In upholding the assessment, the court distinguished the statute from the one at issue in *Nye County* by explaining that the Nevada statute "made 'no attempt to segregate and tax any possessory interest [the contractor] may have in the property,'" whereas the California statute "taxes

only [the contractor's] possessory use interest in the device, and not the underlying value of the device itself." 965 F.2d at 694.

While there are factual distinctions between this appeal and the facts in *United States v. Colorado*, 460 F. Supp. 1184 (D. Colo. 1978) *aff'd*, 627 F.2d 217 (10th Cir. 1980) *aff'd sub nom.*, *Jefferson County v. United States*, 450 U.S. 901 (1981), those distinctions do not invalidate the court's holding that a tax on the full value of exempt property which does not "account[] for any of the imposed limitations on [the permittee's] use of the property. . . subjected the property and the activities of the Federal Government to state and local taxation and thereby infringed upon the immunity of the United States from the imposition of taxes upon its own property." *Id.* (emphasis added). The degree to which the contractor's use of the property was limited by the federal government will be unique in every case. In this case, the district court found that the Navy maintained a constant presence on NIROP. R. 1084. It also found that the Navy retained management and control of NIROP. *Id.*

A central premise of statutory interpretation is that "every effort should be made to interpret [statutes] as being consistent with the dictates of the constitution." *Logan v. Utah Power & Light Co.*, 796 P.2d 697, 700 (Utah 1990); *see also Due South, Inc. v. Department of Alcoholic Bev. Control*, 2008 UT 71 ¶ 39 ("We will construe a statute as constitutional wherever possible, resolving any reasonable doubt in favor of constitutionality.") If the statue is interpreted to require the imposition of privilege tax on

the beneficial use of exempt property, even though the beneficial user does not have full, unfettered use of the property, then the failure to "account[] for any of the imposed limitations on [ATK's] use of the property . . . subject[s] the property and activities of the [Navy] to state and local taxation and thereby infringe[s] upon the immunity of the United States from the imposition of taxes on its own property." *Colorado*, 460 F. Supp. at 1189. The inclusion of the "exclusive possession" requirement preserves the constitutionality of Utah's privilege tax state by insuring that the government's retained interest in the property is not subject to tax.

CONCLUSION

ATK respectfully requests this Court to find that the district court erred when it concluded that ATK has "exclusive possession" of NIROP even though the Navy retains possession and control of that property. If the Court affirms the district court's interpretation of the statute, then ATK requests this Court to find that (a) the economic impact of the privilege tax on ATK gives it standing to raise a Supremacy Clause challenge, and (b) the assessment of privilege tax on the full value of NIROP violates the Supremacy Clause by taxing the Navy's retained interest in and possession of NIROP.

DATED this 4th day of October, 2010.

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CERTIFICATE OF MAILING

I certify that on the 4th of October, 2010, I caused two true and correct copies of the foregoing ***REPLY BRIEF OF APPELLANT IN RESPONSE TO THE BRIEF OF SALT LAKE COUNTY***, as well as a courtesy electronic copy on CD in searchable PDF format, to be mailed in the U.S. Mail, first class postage prepaid, to the following:

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